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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

LUCKY STORES, INC.,
Petitioner,

vs.

RICHARD HOLIHAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should an employer be subject to suit under the ADA for referring an employee to an employee assistance program for problems later attributed to work-related stress?

STATEMENT REQUIRED BY RULE 29.6

The names of all parties in the court below appear in the caption of the case. Lucky Stores, Inc., a Delaware corporation ('Lucky" or "Petitioner"), is a wholly owned subsidiary of American Food and Drug, Inc., a Delaware corporation (AFDI). AFDI is a wholly owned subsidiary of American Stores Company, a Delaware corporation (ASC). Lucky has the following subsidiaries: Advantage Stores, Inc.; Alidamorth, Inc.; Cal-Pharm, Inc.; Food Basket, Inc.; Gemco Stores, Inc.; Hodisco, Inc.; Jim Dandy Markets, Inc.; LKS Manufacturing, Inc.; LS Holdings, Inc.; Lucky Stores, Inc., a California corporation; Lucky Stores, Inc., a Florida corporation; Lucky Stores, Inc., a Nevada corporation; Lucky Stores Properties, Inc.; Magnamart, Inc.; Ordisco, Inc.; Scolari's Stores, Inc.; and Shortco, Inc.

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No. _____

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October Term, 1996

LUCKY STORES, INC.,

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v.

RICHARD HOLIHAN,

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Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at 87 F.3d 362 (9th Cir. 1996), and is reproduced in the Appendix to this Petition. (Appendix A).

JURISDICTION

The judgment of the Court of Appeals was entered on June 26, 1996. Petitioner filed a timely Petition for Rehearing with suggestion for rehearing en banc on July 10, 1996. The Petition was denied in an Order dated August 7, 1996, which is reproduced in the Appendix. (Appendix B). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 et seq., governs this case. 42 U.S.C. § 12102(2) provides:

The term "disability" means, with respect to an individual -

(a) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(b) A record of such an impairment; or

(c) Being regarded as having such an impairment.

STATEMENT OF THE CASE

Richard Holihan sued Lucky Stores, Inc. (hereinafter "Lucky") in the United States District Court for the Central District of California on May 7, 1994, alleging employment discrimination in violation of the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. Holihan claimed that Lucky had discriminated against him on the basis of his alleged disability when it terminated his employment in accordance with its leave of absence policy. Lucky's longstanding policy allows certain employees to take up to six months' continuous leave for any reason. An employee who remains on leave past the policy's six-month maximum, however, is subject to termination.

Holihan began working for Lucky in 1966 and became a store manager in 1976. From then until 1992, he managed eight different stores with no significant performance problems. Holihan's performance as a store manager started to decline in April of 1992. Holihan's supervisors began receiving reports from his subordinates that he had been publicly berating store workers and swearing at them. On one occasion Holihan grabbed a subordinate's shirt, pulled him by the tie, and told him to "shut up." He then told the subordinate "to be in a better mood the next day or [Holihan] would have to get rid of him."

Lucky investigated the numerous complaints lodged against Holihan. On July 30, 1992, Holihan's immediate supervisor, district manager Mark Church, and grocery supervisor Gary Doone met with Holihan. Church asked Holihan if he was having any "problems." Holihan replied that he had no problems whatsoever. Following Lucky's investigation, Holihan was transferred to another store.

During Holihan's first 85 days at the new store, Church received over 50 documented complaints lodged against Holihan by at least 13 different subordinates, including members of the store's managerial staff. These complaints included publicly yelling at employees; throwing bread off shelves in front of customers when he became upset with a bread clerk; and publicly threatening the assistant manager with the loss of his job and blaming him for all of the store's problems.

On October 22, 1992, a meeting was convened to discuss these new complaints. Church, Holihan, and Lucky South Division Operations Vice President Jim Horsley attended the meeting. At the meeting's conclusion, Church offered Holihan a choice: (1) an unpaid suspension pending Lucky's investigation of the allegations against him; or (2) contacting Lucky's Employee Assistance Program ("EAP"). Holihan elected to contact the EAP.

After contacting the EAP, Holihan began a voluntary medical leave of absence on October 26, 1992. Although his first leave of absence was scheduled to end on

February 1, 1993, he thereafter presented Lucky with repeated notes from his doctors extending his absence from work. Holihan never presented Lucky with a doctor's note or report stating that he was permanently disabled from working or that he suffered from any physical or mental impairment which substantially limited any other major life activity. Doctors' reports received by Lucky indicated only that Holihan was stressed and depressed from work.

On May 15, 1993, more than six months into his leave, Holihan gave Lucky a note stating he would not return to work until July 1, 1993. On May 28, 1993, Lucky's Human Resources Department notified Holihan that he was being terminated pursuant to Lucky's leave policy. On September 1, 1993, Holihan reapplied for work at Lucky. Lucky's Vice President of Human Resources, David Hauk, correctly informed Holihan that Lucky had no manager or assistant manager openings at that time. Hauk then offered Holihan the highest available position within Lucky for which he was qualified -- journeyman clerk -- with the chance to apply for a store manager position when one became available. Holihan rejected this offer.

On May 27, 1994, Holihan filed a complaint in the United States District Court for the Central District of California alleging violation of the ADA. During his deposition, Holihan admitted that he was not and had never been disabled, and that he had fully recovered from his alleged "stress" problem as of August 1993. He further admitted that no one had ever told him he had a mental

disability. The District Court granted Lucky's summary judgment motion, ruling that Holihan did not have a disability within the meaning of the ADA, and that he had not proffered sufficient evidence to show that Lucky had "regarded" him as disabled.

On June 26, 1996, the Ninth Circuit reversed the District Court's order granting summary judgment for Lucky. The Ninth Circuit agreed with the District Court that Holihan was not actually disabled but determined that a reasonable jury could infer Lucky had regarded him as disabled within the meaning of the ADA. 87 F.3d at 366.

REASONS FOR GRANTING THE WRIT

This case presents the important recurring question of what action by an employer can trigger a finding that the employer regarded an employee as having a disability under the ADA or the Rehabilitation Act of 1973 ("Rehabilitation Act"). 29 U.S.C. §701 *et seq.* Specifically, this case raises the question of whether referring an employee to an EAP for problems later attributed to work-related stress should subject an employer to suit under the ADA's "regarded as" definition of "disability." To the extent it might conceivably be reconciled with decisions from other circuits, the Ninth Circuit's opinion rests solely and squarely on the fact that Lucky referred Holihan to an EAP. Thus, the effect of the Ninth Circuit's decision will be to stop employers from enabling employees to obtain EAP and other counseling --

a devastating consequence which ought not be allowed to stand.

The Ninth Circuit's analysis conflicts with that of seven other circuits because it ignores the statutory phrase "substantially limits," which modifies the term "impairment." Other circuits have rightly held that an employee cannot be "regarded as" disabled unless the employer regards him as being not only *impaired*, but also *substantially limited* as to one or more major life activities. Here, by contrast, the Ninth Circuit held that because Lucky viewed Holihan as impaired (Lucky knew he had problems and was stressed from work), it may have *ipso facto* regarded him as disabled. The Ninth Circuit's failure to apply the ADA's "substantially limits" language is both incorrect and in conflict with decisions from seven other circuits.

As for Lucky's referral of Holihan to an EAP, the Ninth Circuit appears to say that because Lucky viewed Holihan as unable to continue as Store Manager (when it told him in October 1992 to contact the EAP or be suspended), it regarded him as disabled *vis-a-vis* the major life activity of working. 87 F.3d at 366. Other circuits, however, have rightly held that regarding someone as unable to perform a particular job is not the same as regarding that individual as "substantially limited" in the major life activity of working. With respect to that activity, the Equal Employment Opportunity Commission ("EEOC") has defined the term "substantially limits" to

mean: "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes." 29 C.F.R. § 1630.2(j)(3)(i). Thus, the Ninth Circuit's decision conflicts both with other circuits' holdings and with the EEOC regulations, all of which (except the Ninth Circuit) recognize that being regarded as unable to do a particular job does not constitute being regarded as disabled.

The Ninth Circuit's opinion further conflicts with other circuits by signaling that knowledge of job-related stress is enough to impute to the employer a perception that the employee is disabled. Other courts have held that job-related stress is not a "substantially limiting" impairment under the ADA. It follows that an employer's knowledge of job-related stress is insufficient to trigger "regarded as" liability under the ADA.

Lastly and most importantly, under the Ninth Circuit's view of "regarded as" liability, any employer who suggests that an employee seek EAP or other counseling faces potential ADA liability if that employee ultimately suffers an adverse employment action. The Ninth Circuit's opinion threatens the future of employee assistance programs, at least within that circuit and perhaps across the country, by discouraging employers from helping employees experiencing personal difficulties (which may or may not involve disabilities) for fear that they will be held to have "regarded" such employees as disabled. The future of helpful, socially responsible and confidential EAP

programs is at risk. Working men and women in need of counseling or other services will be deprived of assistance because employers will be afraid to refer them for help. Personal crises will go unaddressed, and domestic or workplace violence may occur where they otherwise would not. In sum, laudable employee assistance efforts will be gutted unless the Ninth Circuit's decision is reversed.

This Court has not issued any opinion regarding the ADA since the statute's enactment, nor has the Court ever issued an opinion on the "regarded as" issue under the Rehabilitation Act.[1] The Ninth Circuit's opinion clearly poses the above-described conflict in the circuits, as well as an immediate risk to the nation's EAP programs. Guidance by this Court concerning the ADA in general, and ADA "regarded as" liability in particular, is critical at

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[1] The Court has addressed the "regarded as" issue in *dicta*. In School Board of Nassau County v. Arline, 480 U.S. 273, 289 (1987), the Court observed: "By amending the definition of handicapped individual [in Section 504 of the Rehabilitation Act in 1974] to include not only those who are actually physically impaired, but also those who are regarded as impaired and who, as a result, are substantially limited in a major life activity, Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from the actual impairment." (Internal quotations omitted.)

this juncture because of the immediate threat posed by the Ninth Circuit's decision to EAP programs and the employees served thereby.

I.

THE NINTH CIRCUIT'S OPINION SIGNIFIES A CLEAR AND PROFOUND SPLIT WITH OTHER CIRCUITS AS TO WHEN AN EMPLOYER CAN REASONABLY BE FOUND TO HAVE REGARDED AN EMPLOYEE AS DISABLED UNDER THE ADA.

Under the ADA, the term "disability" means, with respect to an individual:

- A physical or mental impairment that substantially limits one or more of the major life activities of such individual;

- A record of such impairment; or

- Being regarded as having such an impairment.

The EEOC further defines being "regarded as having" a disability to include persons who have "a physical or mental impairment [which] substantially limits major life activities only as a result of the attitudes of others toward

such impairment." 29 C.F.R. § 1630.2(a)(2).[2] As recognized by the EEOC, Congress intended the "regarded as" part of the definition of "disability" to protect persons from a range of discriminatory actions based on myths, fears and stereotypes about disability. 1 EEOC Technical Assistance Manual ("EEOC TAM") § 2.2(c), reprinted in ADA Manual BNA § 90:0152 (1992).

A recent Fourth Circuit opinion exemplifies what Congress intended by the "regarded as" prong of the ADA's definition of disability. In Runnebaum v. NationsBank of Maryland, 95 F. 3d 1285 (4th Cir. 1996), the court held that an asymptomatic carrier of the HIV virus stated a claim under the ADA "regarded as" analysis. The court noted a supervisor's deposition testimony that he felt "panicky" and "uncontrolled," and that he believed the plaintiff's death from AIDS might be imminent. The court found a genuine issue of material fact as to whether the employer regarded the plaintiff as having an impairment

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[2] See also Wooten v. Farmland Foods, 58 F.3d 382, 385-86 (8th Cir. 1995) (citing School Board of Nassau County v. Arline, 480 U.S. 273, 279 (1987)) ("A person is 'regarded as having' an impairment that substantially limits the person's major life activities when other people treat that person as having a substantially limiting impairment. The focus is on the impairment's effect upon the attitudes of others. This provision is intended to combat the effects of archaic attitudes, erroneous perceptions, and myths about work to the disadvantage of persons with or regarded as having disabilities."). (Internal citations omitted.)

which "substantially limits" a major life activity. Id., at 1297.

The Ninth Circuit's opinion deviates from Runnebaum in that it utterly fails to examine whether Lucky regarded Holihan as being *substantially limited* in a major life activity. The court did correctly note that the only major life activity at issue herein is "working." 87 F.3d at 366. Thus, like the plaintiff in Runnebaum, Holihan had to demonstrate that Lucky regarded him as being substantially limited in his ability to work. The Ninth Circuit, however, simply skipped the "substantially limits" step of ADA "regarded as" analysis.

Lucky knew only the following about Holihan's condition:

- At a meeting between Holihan and Lucky management in July, 1992, district manager Mark Church asked Holihan if he was having any "problems"; Holihan said he had none.

- At another meeting in October 1992, Church encouraged Holihan to seek counseling through Lucky's EAP or be placed on an unpaid suspension.

- Several doctors reported diagnosing Holihan with work-related stress and depression.

In dispensing with the requirement that Holihan show that Lucky perceived him as substantially limited in working, the Ninth Circuit's decision plainly conflicts with the other circuits which have addressed this issue. Those circuits have held that an employer's perception of an impairment alone cannot, of itself, constitute a perception of disability. In Daley v. Koch, 892 F.2d 212 (2d Cir. 1989), for example, the Second Circuit held that rejecting a police candidate based on a doctor's report indicating "poor judgment, irresponsible behavior, and poor impulse control" does not give rise to a claim for disability discrimination under the Rehabilitation Act. The court observed:

> This court holds 'poor judgment, irresponsible behavior and poor impulse control' do not amount to a mental condition that Congress intended to be considered an impairment which substantially limits a major life activity and therefore a person having those traits or perceived as having those traits cannot be considered a handicapped person within the meaning of the act. If appellant had been perceived by the Police Department to be suffering from an impairment which substantially limits a major life activity, whether or not in reality he

> had no impairment, then he might qualify for a relief under the Rehabilitation Act. However, it is clear from the facts that the Police Department never considered appellant to be suffering from an impairment which substantially limits a major life activity.

Id. at 215.

Nowhere did the Ninth Circuit analyze whether these facts showed that Lucky considered Holihan to be suffering from a *substantially limiting* impairment.

In Kocsis v. Multi-Care Management, 1996 WL 587859 (6th Cir. 1996), the Sixth Circuit recognized that the ADA's "regarded as" prong requires a plaintiff to "show that the perceived impairment is a substantial limitation on a major life activity." Id., at *8 (internal citations omitted). Kocsis was a registered nurse who alleged she had been demoted in violation of the ADA. The court observed that "Kocsis' performance evaluations reveal that the attendant, her supervisor, was aware of her health problems, lack of energy and mood swings. While the defendant may have perceived that Kocsis' health problems were adversely affecting her job performance, there is no evidence that defendant regarded Kocsis as being unable to care for herself or to perform all of the duties of her job." Id.

In Kelly v. Drexel University, 94 F.3d 102 (3d Cir. 1996), the Third Circuit held that an employee who limped from a hip injury had failed to show he was "regarded as" disabled by his employer. "The mere fact that an employer is aware of an employee's *impairment* is insufficient to demonstrate either that the employer regarded the employee as disabled or that the perception caused the adverse employment action." Id. at 109 (emphasis added). The Ninth Circuit, by contrast, relied precisely on Lucky's awareness of some vague impairment and the EAP referral.[3]

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[3] Decisions from the Fifth and Eighth Circuit Courts of Appeals also conflict with the Ninth Circuit's decision in this case. In Ellison v. Software Spectrum, Inc., 85 F. 3d 187, 192-93 (5th Cir. 1996), the Fifth Circuit held that an employer was not liable under the ADA's "regarded as" prong where an employee who had recently recovered from breast cancer surgery was terminated during a reduction-in-force. The court found no material fact issue as to whether the company had regarded Ellison as having a substantially limiting impairment, even though her supervisor suggested that she get a lumpectomy, made jokes about her cancer, and mentioned it during employee meetings. In Aucutt v. Six Flags, 85 F.3d 1311 (8th Cir. 1996), the Eighth Circuit held that the employer's awareness of an employee's medical problems did not mean the employer regarded the employee as disabled. Aucutt was terminated as part of a reduction-in-force. The employer (Six Flags) knew of Aucutt's medical problems -- angina, high blood pressure, and coronary artery disease -- and his inability to navigate a mandatory employee obstacle course without severe pain. Id. at 1319. The court stated: "the fact that Six Flags was aware of his medical problems is insufficient to establish that Six Flags 'regarded' him as disabled." Id. at 1320.

The Seventh Circuit properly considered the statute's "substantially limits" language in Stewart v. County of Brown, 86 F.3d 107 (7th Cir. 1996). There, a deputy sheriff began suffering from stress, induced both by the pressures of his job and the fact that he ran a full-time business on the side. In May 1988, he underwent a complete physical and, like Holihan, was diagnosed as depressed. He was similarly diagnosed nine months later and, like Holihan, went on leave from work, informing his supervisor in February 1989 that he was being treated by a psychologist. Id. The next month, the deputy's doctor concluded that he could return to his job. His supervisor, however, told him to undergo further psychological testing before returning to work. Id. The deputy (Stewart) was eventually returned to his position but was soon charged with violating department rules regarding excessive use of force. Id. The sheriff's department decided to terminate Stewart, but later reassigned him to a courthouse security position after an arbitrator had reduced the termination to a 30-day suspension. Id. Stewart sued under the ADA and Rehabilitation Act. The Seventh Circuit affirmed summary judgment in favor of the sheriff's department, holding as a matter of law that there was no perception of a mental impairment substantially limiting one or more major life activities, even though (1) Stewart suffered from workplace stress/depression, (2) his supervisor called him "excitable," (3) the supervisor ordered a number of psychological evaluations for him, and (4) the supervisor told third persons that he considered Stewart to be emotionally or psychologically imbalanced. Id. at 111.

The above-cited cases directly conflict with the Ninth Circuit's decision, which holds in effect that knowledge of a mere impairment, no matter how insignificant, plus referral to an EAP can establish "regarded as" liability under the ADA. The Ninth Circuit's failure to consider whether Lucky regarded Holihan as being *substantially limited* in a major life activity is a significant departure from the approach of the other circuits in similar cases. This Court should examine and correct this incongruity.[4]

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[4] The Ninth Circuit's analysis also conflicts with the important principle that an employer cannot be liable under the ADA where it lacks knowledge of a substantially limiting impairment. For example, in Simpkins v. Specialty Envelope, Inc., 1996 WL 452858 (6th Cir. 1996) (attached hereto pursuant to 6th Cir. Rule 24(c)), the court held that "an employer who discharges an employee without knowledge of the employee's disability is not liable" under the ADA. Id., at *5. (Appendix C). Simpkins' employer clearly knew she had an impairment: after a meeting to discuss "problems" with her performance, she was observed beating on the bathroom walls and then running through the building "stuffing tissues in her mouth to keep from screaming." Id., at *1. The next day, Simpkins' husband called the company and said "his wife had been hospitalized and would be unable to work for several days." Id., at *2. The Eighth Circuit affirmed summary judgment for the employer (Specialty) because Simpkins "never told anyone at Specialty she was suffering from a disability or that a doctor had diagnosed her as having had a *major* depressive episode." Id., at *2 (emphasis added). Although addressing the employer's lack of knowledge (instead of employing "regarded as" analysis), the court concluded that knowledge of an impairment alone is insufficient; the impairment must substantially limit a major life activity. Id., at *6. With respect to the employer lacking knowledge of

The Ninth Circuit's decision further conflicts with those of at least the Eighth, Tenth, Fifth and Eleventh Circuits inasmuch as the Ninth Circuit effectively held that Lucky may have regarded Holihan as disabled based on his inability to perform a single position. In Wooten, supra, the Eighth Circuit analyzed the ADA's "regarded as" prong as it relates to the major life activity of working. Wooten was terminated after having provided his employer (Farmland) with a doctor's note restricting him from working with meat products, working in a cold environment, and lifting over 20 pounds. 58 F.3d at 384. In affirming summary judgment for Farmland, the Eighth Circuit noted that even if Farmland had believed Wooten's restrictions to be permanent, the restrictions against working with meat products in a cold environment would not substantially limit Wooten's major life activities: "Working does not mean working at a particular job of that

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a disability, see also Taylor v. Principal Financial Group, Inc., 93 F.3d 155, 164 (5th Cir. 1996) (employer lacked knowledge of alleged mental disability even though employee told supervisor he had been diagnosed with bipolar disorder; "The evidence does not show that Taylor ever told Matthews [the supervisor] that he suffered a limitation as a result of his alleged impairment."); Miller v. Nat'l Casualty Co., 61 F.3d 627, 630 (8th Cir. 1995) (sister's statements that employee was "falling apart" not enough to alert "the company to the fact that Miller suffered from a mental disability that the ADA would require the company to accommodate."); Hedberg v. Indiana Bell Telephone Co., Inc., 47 F.3d 928 (7th Cir. 1995).

person's choice." Id. at 386 (internal quotations omitted).[5] In the instant case, when Lucky encouraged Holihan to visit the EAP, it at most regarded him as unable to perform his Store Manager job. By relying on the EAP referral to find that Lucky regarded Holihan as disabled, the Ninth Circuit in effect held that viewing an employee as unable to perform his own job is the same as "regarding" the employee as disabled.[6]

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[5] Here, no evidence suggests that Lucky regarded Holihan as *permanently* impaired. Temporary impairments are not substantially limiting and, therefore, are not disabilities under the ADA. See 29 C.F.R. § 1630.2(j); EEOC TAM § 2.2(a)(iii). See also Evans v. Dallas, 861 F.2d 846 (5th Cir. 1988) (plaintiff not handicapped under Rehabilitation Act where injury not "an impairment of a permanent nature"). If the employer regards an employee as temporarily impaired, he is not regarding the employee as disabled. In this case, Holihan had worked at Lucky for over 20 years with no significant performance problems. Given that history, Lucky could only have viewed Holihan's problems in 1992 as temporary, which was confirmed in September 1993 when he reapplied for work and was offered a position.

[6] In McDonald v. Delta Air Lines, Inc., 94 F.3d 1437 (10th Cir. 1996), an airline mechanic asserted that Delta's knowledge of his cataract problem evidenced the fact that it "regarded" him as disabled. Id. at 1445. The Tenth Circuit, however, observed that Delta's only employment action as a result of such knowledge was to disallow McDonald from taxiing aircraft. Id. The court further observed that taxiing aircraft is neither a class of jobs nor a broad range of jobs in various classes, but is instead "a single, particular job." Id. See also Chandler v. City of Dallas, 2 F.3d 1385 (5th Cir. 1993) (employer who viewed vision-impaired employee as unable to perform driving job did not regard employee as substantially limited in major life activity of

It is true that after referring Holihan to its EAP, Lucky received notes from Holihan's doctors indicating he was suffering from work-related stress and general depression. But to the extent the Ninth Circuit's decision hinges on those notes, it conflicts with opinions holding that stress and depression disorders are not disabilities under the ADA because they are not substantially limiting impairments. See, e.g., Pritchard, supra, Cadelli v. Fort Smith School Dist., 852 F. Supp. 789, 796-97 (W.D. Ark. 1993), aff'd on other grounds, 23 F.3d 1295 (8th Cir. 1994); Margeson v. Springfield Terminal Ry. Co., 1993 WL 343676 (D. Mass. 1993), aff'd without op., 32 F.3d 561 (1st Cir. 1994). If these conditions themselves are not disabilities, then Lucky's knowledge that Holihan was experiencing these or similar conditions does not make him "disabled" under the ADA. Rather, Lucky viewed Holihan as what he was -- stressed out. If being stressed out is not a disability under the ADA, then regarding an employee as stressed out is not regarding him as disabled as a matter of law.

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working); Pritchard v. Southern Co. Services, 92 F.3d 1130, 1133 (depression itself does not constitute a disability under ADA; employee whose depression only prevented him from working in a nuclear plant held not substantially limited in the major life activity of working).

II.

THE NINTH CIRCUIT'S DECISION THREATENS THE NATION'S EMPLOYEE ASSISTANCE PROGRAMS.

The Ninth Circuit's decision means that employers who refer employees to EAPs risk ADA liability under "regarded as" analysis. The effect of this deviant ruling will be to discourage employers from taking positive, proactive steps to address employee "problems" before they become personal and/or workplace crises.

This Court recognized in June that the "public interest [is] served by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem. The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance." Jaffee v. Redmond, 116 S. Ct. 1923, 1929 (1996) (adopting psychotherapist-patient privilege and extending it to social workers). A recent study on changes in the modern workplace found that problems in employees' personal lives caused by their current job were the single most potent off-the-job stressor. Mary Murch & John Kamp, *American Workers Under Pressure: Why EAPs are a Valuable Commodity*, EAPA Exchange 20-21 (June 1995).

EAPs are now widely recognized as a powerful means for helping maintain the nation's mental health. In a

recent study of the federal court system's EPA, it was found that:

> In 42 percent of the cases, the EAP assessed mental health problems such as stress, depression, and anxiety. The EAP assessed marital or other relationship issues as the primary problem in 23 percent of the cases. Other family issues such as parenting were identified as the primary problem in 16 percent of the cases. Job issues were assessed as the primary problem in 12 percent of the cases. Substance abuse was assessed as the primary problem in 2 percent of the cases.

Ernest Hardaway et al., *The Employee Assistance Program: Help for Court Managers and Employees*, 60-MAR Fed. Probation 60, at *62 (March 1996).[7]

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[7] In 1990, the federal courts and the U.S. Health Service's Division of Federal Occupational Health entered into an interagency agreement providing EAP services nationwide to court managers and employees, as well as their family members. Hardaway, supra, at *60.

That is not to say that the bulk of employees benefiting from EAPs are mentally impaired, much less that they are actually "disabled" or "regarded as" disabled within the meaning of the ADA. EAPs provide counseling "on everything from alcohol and drug abuse to financial, legal and marital problems." *To The Couch; Employee Assistance Programs*, The Economist, July 23, 1994, at 65.[8]

It is the threat of workplace violence, however, which has led many employers around the country to make EAPs a key component of their management efforts and benefits packages. According to a Northern National Life Insurance Study, more than 2 million workers were physically assaulted in 1993. See Mark J. Maggio, *Keeping the Workplace Safe: A Challenge for Managers*, 60-MAR Fed. Probation 67 (March 1996). The dangers posed by workplace violence are particularly acute at this juncture in our nation's economic history. As a Safety Training Specialist at the Federal Judicial Center explained:

> Perhaps one of the most serious safety issues for

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[8] In 1994, about 26.6 million Americans were covered by full EAP programs, a 50% increase since 1992. Another 76 million Americans have access to less formal counseling, e.g., telephone hot lines. *To The Couch*, supra, at 65. A 1995 survey of 100 large companies found that 88% of companies surveyed offered their employees EAPs. *Work/life: From a Set of Programs to a Stragegic Way of Management*, 22 Employment Relations Today, Sept. 22, 1995, at 67.

managers is coworker violence. The climate in corporate and government agencies today is ambiguous, uncertain, and tense. Downsizing and reinvention of the workplace have created a myriad of new problems for employees and managers. With these new problems have come more pressures - add them to pre-existing pressures and you end up with people pushed to the breaking point. Employees are finding that the normal coping skills they have called upon in the past may no longer work as well as they once did. Moreover, in today's world, it seems that often people do not want to be, or do not believe they should be, accountable for their behavior. An aggravating factor is the steady increase in violent acts in our streets, homes, and schools and our desensitization to these

> incidents. Mixing all of these ingredients together gives you the perfect recipe for explosive life-threatening behavior in the workplace.

Maggio, supra, at *67. "The EAP plays a key role in the prevention of workplace violence and in the development of a practical, comprehensive response to volatile and traumatic incidents." Hardaway et al., supra, at *65. See also *Developing Policies Addressing Workplace Violence*, 22 Employment Relations Today, Sept. 22, 1995, at 25.

Quantifying the benefits of EAPs in terms of lives saved, lives improved, dollars saved or productivity increased is difficult. However, in times of crisis, either personal or national, EAPs are plainly one of the country's most valuable assets. As noted in *The Employee Assistance Program: Help for Court Managers and Employees*, supra, at *65:

> During this reporting period [FY 1995], EAP professional[s] provided counseling, education, and support services to management, employees, and family members in the aftermath of the Oklahoma City bombing. This tragedy made it clear what a critical role the EAP has in any

> disaster response plan. Within 1 hour of the blast on April 19, 1995, EAP counselors were on site and began assessing needs, counseling court employees and family members, and consulting with managers and supervisors. EAP counselors encouraged employees to vent their feelings about the situation and provided them coping strategies for dealing with the trauma. In the following days, 12 EAP counselors were assigned to Oklahoma City. They provided services to the many federal agencies served by DFOH EAP. For the courts, the EAP offered seven group sessions, which 328 employees attended. Ninety-one individuals were counseled separately.

In the aftermath of the Ninth Circuit's decision, the federal government will probably continue referring employees to EAPS. Many private employers will not. A

recent human resources trade publication summarized the Ninth Circuit's opinion as follows:

> Once a company helps an employee with problems, that indicates it perceives the employee as disabled. That perception triggers full ADA protection, whether in the end the worker was technically disabled or not.

What's Working in Human Resources, Aug. 22, 1996.[9]

The clear implication is that an employer should think twice about assisting an employee whom it believes may have problems, lest it find itself facing an ADA claim. The likely consequence of the Ninth Circuit's decision is unmistakable: employers will not attempt to assist employees who have been exhibiting unusual behavior by

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[9] While the decision has not heretofore been cited by other courts, numerous human resources and legal publications have published articles regarding the decision. See, e.g., Susan A. Bocamazo, *Employee Is Asked If He Has "Problems"; Sues Under ADA: Companies Can No Longer Be 'Compassionate,'* Lawyers Weekly, August 12, 1996, at 1, 17; *Regarded As Disabled Claim Upheld,* The Utah Labor Letter, August 1996, at 17; David E. Rovella, *ADA Triggered By Employer Treatment*, The National Law Journal, July 15, 1996; Al Bianchi, *If You Ask Some Questions, You Can Get Unlucky,* Marin-Independent Journal, October 8, 1996.

recommending that they seek EAP or other help. Some such employees will be summarily terminated. Others will be left alone, while problems go unaddressed and pressures mount.

In sum, while the Ninth Circuit's decision is bad law, it is terrible policy. Courts should be encouraging EAPs, particularly in this era of downsizing and economic uncertainty. In Delval v. PPG Industries, Inc., 590 N.E.2d 1078 (Ind. App. 1992), the plaintiff alleged that his former employer had defamed him by telling an EAP social worker he had expressed suicidal and homicidal thoughts. In affirming summary judgment for the employer, the court stated:

> The effectiveness of employee assistance programs would be severely diminished if a supervisor's referral of an employee to the company's EAP could be considered an intercorporate publication sufficient to sustain a defamation claim. Such a result would have a chilling effect upon employee referrals to EAP's which we recognize as an important benefit for both employers and employees.

Id. at 1081.

The Ninth Circuit's decision will undoubtedly have some chilling effect upon employee referrals to EAPs. The extent and consequences of that chill remain to be seen. Alternatively, they can be avoided -- by reversing the Ninth Circuit's decision and protecting EAP services nationwide.

CONCLUSION

Lucky Stores respectfully requests that this Petition be granted so that this Court can resolve the conflict in the circuits and protect employee assistance programs.

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